IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1279

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER DISTRICT *Appellant*,

versus

DEPARTMENT OF PROPERTY VALUATION OF THE STATE OF ARIZONA *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Stripped of inaccuracies, the appellee's brief in support of the Motion to Dismiss (hereinafter, appellee's brief) simply underscores the fact that this Court has jurisdiction to review this case, and that such jurisdiction should be exercised, because the apppellant has been deprived of important federal constitutional rights.

From the beginning, before every state court, the Project has argued that the statutes of the State of Arizona are unconstitutional insofar as they fail to provide any procedure whereby a taxpayer in the posi-

tion of the Project, i.e., one who has prevailed before the Board of Property Tax Appeals and is therefore satisfied with that Board's decision, but who nevertheless finds itself in court because the State has appealed, can assert in that court proceeding its constitutional argument that the taxing scheme to which it is subjected is a violation of its equal protection rights.

The appellee has never denied — nor could it — that the Project has a due process right to raise this equal protection argument. But the controlling fact which the appellee has never been willing to face — an unwillingness that is still reflected in its brief before this Court — is that the statutes of the State of Arizona foreclose the exercise of this conceded constitutional right to someone in the position of the Project. In that respect, those statutes are unconstitutional.

It is true, as the appellee reminds us once again, that the constitutional issue can be raised if the Project will pay its taxes under protest. This gratuitous advice is no more helpful here than it was below. The fact of the matter is that this voluntary contributor has nothing to protest. It did not, and will not appeal, because it is satisfied with the Board's decision. The *only* purpose for such a "payment under protest" would be to open the door for exercise of its constitutional right, and this Court held in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) that conditioning the exercise of an important right — in this case, unlike *Harper*, the exercise of a right guaranteed by the Constitution — is itself unconstitutional.

Amazingly, though the appellee continues to offer the advice that "if the Project has paid taxes under protest, it can commence an action under Section 204 alleging unconstitutional discrimination immediately"[1], it then states, on the very next page, that [a]ppellant bases its argument on the premise that it might now pay some amount under protest in addition to the amount found due under the Board's ruling; then, sue for a refund alleging unconstitutional discrimination. Clearly, this procedure is not authorized under Arizona law."[2] Though confusing, this inconsistency is not fatal to the appellee's position, because in fact, the appellant agrees that the earlier statement is correct: the appellant's conceded constitutional rights would be made available by the Arizona statutes, if the Project would "pay under protest." But we repeat: the Project has nothing to protest. For a taxpayer in the position of the Project — in court because the Department of Property Valuation has appealed from the Board's decision — the Arizona statutes have simply foreclosed the due process constitutional right to raise the equal protection argument. Whether this foreclosure was inadvertent is immaterial. To the extent that such a denial is imposed on the limited class of taxpayers in the Project's position, the statutory provisions are unconstitutional.

The appellee asserts that "[c]onditioning a suit for refund on payment of the tax is necessary for the stability of local government and there is no constitu-

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[1] Appellee's brief, p. 17.

[2] Id. at 18.

tional impediment to such a requirement."[3] While probably correct, this statement is totally irrelevant. The issue here is not whether the State may condition a refund payment suit on the payment of a tax. The Project is not bringing any refund payment suit. The issue here is whether the State may condition the exercise of a conceded constitutional right on the payment of a tax, indeed, a tax which the highest State authority that has spoken on the issue to date has formally declared that the Project does not owe.

Though controverted by other parts of the Brief in Support of the Motion to Dismiss, the appellee effectively admits this point: "[Appellant] cannot now raise the constitutional issue since it chose to make an administrative appeal rather than a direct appeal to the Superior Court."[4] The concession that the appellee cannot now raise the constitutional issue is correct. The assertion that the reason for this is that the Project elected to pursue its administrative remedy is both false and irrelevant. The "direct appeal" to which the appellee refers is an appeal under A.R.S. §42-151. The Court of Appeals clarified that under this "direct appeal" which the appellee counsels that the Project should have taken:

> "It is important to note, however, that the superior court's review under A.R.S. §42-151, whether that review is the result of an administrative appeal or a direct appeal, is limited to determining the correctness of the classification or valuation of the taxpayer's property *and other issues such as unconstitutional discrimination*

[3] *Id.* at 22.

[4] *Id.* at 18.

> *cannot be heard in that proceeding. McCluskey v. Sparks*, 80 Ariz. 15, 291 P.2d 791 (1955); *Maricopa County v. Chatwin*, 17 Ariz. App. 576, 499 P.2d 190 (1972)."[5]

The Arizona Supreme Court did not reject the Court of Appeals' ruling concerning the limits on the Section 151 appeal. The Supreme Court's only disagreement with the Court of Appeals' opinion concerned the scope of a suit following payment under protest under Section 42-204; in the Supreme Court's view, classification and valuation issues may also be raised in such a proceeding.

Therefore, the appellee's statement that the reason that the Project "cannot now raise the constitutional issue" is because "it chose to make an administrative appeal rather than a direct appeal to the Superior Court" is flatly false. Moreover, even if the statement were correct, we know of no principle of law that entitles the state to condition the exercise of a federal constitutional right on foregoing an otherwise available state administrative procedure.

We will respond briefly to the issues of finality, case or controversy, and whether the federal issue was properly raised below.

The judgment of the Arizona courts on the federal constitutional issue is as final as it will ever be; it is clearly final within the meaning of 28 U.S.C. §1257 (2), as interpreted by this Court in such decisions as *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Hudson Distributors v. Eli Lilly*, 377 U.S. 386 (1964);

[5] Jurisdictional Statement, Appendix B, pp. B-9 and B-10 (Emphasis added.)

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963); and *Construction Laborers v. Curry*, 371 U.S. 542 (1963). Concerning the federal constitutional issue which establishes this Court's jurisdiction, the Arizona courts have spoken finally, and there is nothing further for them to do. The only remaining issues to be tried, as the appellee concedes, are "classification or valuation of Appelant's property."[6] Thus, the finality issue in this case is completely analagous to the situations (1) in *Curry*, in which a permanent injunction would not issue until after further hearing, but the issue of the jurisdiction of the Georgia courts to afford any relief had been "finally determined by the judgment below and [was] not subject to further review in the state courts"[7]; (2) in *Langdeau*, where the trial on the merits had not been held, but the opinion of the state court concerning "which state court has proper venue to entertain an action against two national banks"[8], was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action"[9]; (3) in *Hudson*, where the still pending issues to be tried in state court were completely independent of the federal question, the interaction of the McGuire Act and the Ohio Fair Trade Act; and (4) in *Cox*, where this Court held that "[t]he Georgia Supreme Court's judgment is plainly

[6] Appellee's brief, p.7.
[7] 371 U.S. at 549-550.
[8] 371 U.S. at 558.
[9] *Ibid.*

final on the federal issue and is not subject to further review in the state courts."[10]

Thus, the case may fit within several of the exception categories discussed in *Cox*. It clearly fits within the fourth, and within the holdings of *Curry*, *Langdeau*, *Hudson*, and *Cox*.

For this same reason, the appellee's contention that there is no case or controversy because "[a]pellant is not required to pay or being threatened with payment of any amount with which it disagrees"[11] is wide of the mark. The controlling fact is that the appellant is being forced to go to trial on issues of valuation and classification under procedures that clearly deprive it of its procedural constitutional rights. The Arizona courts having finally spoken on this issue, there will be no further opportunity within the Arizona judicial system for the appellant to obtain vindication of its constitutional rights. This is therefore the clearest possible example of a case or controversy.

The appellee's contention that "the precise question presented by appellant" was not raised before the Arizona courts is also without merit.

The Court of Appeals opinion states:

> "The Project's third contention that the proceeding under A.R.S. §42-151 is one in which it is denied the right to interpose reasonable and

[10] 420 U.S. at 485.
[11] Appellee's brief, p. 16.

legitimate defenses (the issue of unconstitutional discrimination) is more serious in nature."[12]

The Court of Appeals' solution to this "serious" issue — and the root error in its holding — was its reasoning, discussed in the Jurisdictional Statement, that there was an adequate alternative remedy: payment under protest, followed by suit under §42-204. Examination of the Motion for Rehearing filed with the Court of Appeals (the only argumentative document permitted to be filed beyond the Court of Appeals decision stage)[13] clearly reveals that the central purpose of that motion was to persuade the Court of Appeals, and later the State Supreme Court

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[12] Jurisdictional Statement, Appendix B, p. B-14.

[13] A.R.S. §12-120.24 provides for discretionary review by the Arizona Supreme Court of a case that has been decided by the Court of Appeals. Discretionary review is requested by filing a Petition for Review, which may not be supported by any argument, and to which no response is permitted. (See Rule 47 (b), Rules of the Arizona Supreme Court.) The statute further provides that at the Supreme Court stage, "[n]o further briefs or oral argument shall be filed or had unless the supreme court so directs." A.R.S. §12-120.24. In the event that the petition is accepted for review, four additional copies of the briefs filed before the Court of Appeals are transmitted to the Supreme Court. (Rule 47 (b), Rules of the Arizona Supreme Court.) In the instant case, as in the great majority of cases in which the Supreme Court reviews a Court of Appeals decision, there was no further briefing or argument beyond the Court of Appeals level. Accordingly, the first and last opportunity to point out the constitutional inadequacy of the Court of Appeals "alternative" procedure, was the Motion for Rehearing before the Court of Appeals.

of the inadequacy of this "alternate remedy." The opening paragraphs of the Motion for Rehearing state:

> "The opinion of the Court is based upon a misunderstanding of a central fact. Agreeing that the taxpayer (Salt River Project) could be denied its constitutional right to allege discriminatory treatment in an appeal by the Department of Valuation under A.R.S. §42-151 (in which valuation is the only issue), the Court nevertheless concluded that the problem is cured by the apparently assumed "fact" that the taxpayer could bring a separate action under A.R.S. §42-204 and there raise constitutional issues. (Opinion, p. 12) That might be true where the taxpayer is appealing an unfavorable decision of the Board of Property Tax Appeals. But it is *not true* where, as here, the taxpayer was satisfied with the decision of the Board and the Department appealed under A.R.S. §42-151.
>
> Here, the taxpayer *cannot*, as the Court incorrectly assumed, bring a separate action under A.R.S. §42-204 because that statute requires that the taxes for which a refund are being sought are (1) due and (2) paid under protest before delinquent before suit can be brought. Here, and in all other cases where the taxpayer is satisfied with Board action, he is trapped. *There are no taxes to be paid under protest before delinquent.* He cannot allege taxes have been "illegally collected" if he is satisfied with Board action.
>
> Thus, the taxpayer is precluded from bringing a §204 suit and denied his constitutional right to

raise issues of discrimination. In this respect the Court's opinion is wrong."[14]

The requirement that the federal issue be raised before the state courts as an element of §1257 (2) jurisdiction was recently reviewed by this Court in *Cardinale v. Louisiana,* 394 U.S. 437 (1969). Among the relevant considerations are:

> "In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor v. Ohio,* 385 U.S. 92 (1966), they should be given the first opportunity to consider them."[15]

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[14] Appellant's Motion for Rehearing before the Arizona Court of Appeals, p.1. (Emphasis in original) Pursuant to Rule 12 of the Rules of this Court, the Clerk of the Arizona Supreme Court has certified a copy of the Motion for Rehearing filed with the Arizona Court of Appeals and the Appellant has transmitted that certified copy to the Clerk of this Court.

[15] 394 U.S. at 439.

Both the letter and also the spirit of this requirement were fulfilled in this case. Whether denominated as the issue, the sub-issue or whatever, the facts are that (1) the Court of Appeals recognized the constitutional issue as "serious" and attempted to avoid it rather than decide it, by erroneously assuming an alternate remedy, and (2) the appellant argued the inadequacies of that alternate remedy in the Motion for Rehearing; the Motion for Rehearing was the earliest — indeed it was the only — opportunity that the appellant had to make that point before the Arizona courts. The appellant did everything that it could possibly have done to give the lower courts the chance to correct their own error, and to assure that the record provides adequate basis for review in this Court.

The Arizona courts did not correct that error. The Court has jurisdiction to do so. Jurisdiction should be noted, and the error corrected.

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CERTIFICATE OF SERVICE

I, LEO R. BEUS, caused to be served a copy of the Notice of Appeal, upon counsel for the appellant as required by Rule 33 of the U.S. Supreme Court Rules, by depositing a copy of said Notice of Appeal in the United States Post Office with first class postage prepaid, and addressed to counsel of record for the Appellant and to the other counsels of record at:

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